Supreme Court, U.S.
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No. 00-1255

In The

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,

Petitioner,

v.

HON. FRANK G. VOLLOR,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Where the only decision of the state supreme court in the case is a brief denial of a stay of a temporary restraining order that does not address the merits of the TRO, and where the questions presented by the petitioner in this Court go not to the propriety of denying the stay but to the underlying merits of the TRO, is there a "final judgment[]" on the merits of the TRO sufficient to give this Court jurisdiction to grant the petition under 28 U.S.C. § 1257?

2. Given that the TRO expired by its own terms after ten days and was stayed by a Justice of this Court on the third day, given that the election to which it related has come and gone, given that the candidate supported by the petitioner was victorious and will not be campaigning for re-election for another eight years, given that the respondent will not be running for election any time soon, given that the possibility of a future injunction against the petitioner is quite speculative, and given that the claims of the petitioner will be timely resolved in the lower courts, is this case moot?

(Assuming jurisdiction to address the merits of the TRO, the petition also raises the following questions:)

3. Are corporate television advertisements clearly designed to persuade voters to cast ballots for a particular state supreme court candidate, aired in the three weeks prior to the election, immune from state campaign finance laws simply because they do not tell the voters in exact words to "vote for" or "elect" the candidate?

4. In the event the advertisements are subject to state campaign finance laws and in the event the substantial expenditures on them violate state law, was a TRO permissible in the context of the unusual circumstances and timing in this case?

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No. 00-1255

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for
Writ of Certiorari to the
Supreme Court of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

As directed by the Court, the respondent, Hon. Frank G. Vollor, submits this response to the petition for writ of certiorari and urges that the petition be denied.

STATEMENT OF THE CASE

This case grows out of a highly unlikely set of events forged, because of unusual circumstances, in a compressed time frame. It comes to this Court with no evidentiary record save the uncontested factual allegations in affidavits from the respondent and his attorney. There is no final judgment from

the appellate court below on the merits of the temporary restraining order being challenged, and there is no written opinion from that court save a brief order denying the motion for stay.

The Chamber of Commerce (the petitioner here), an incorporated entity, began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates, including incumbent Justice Jim Smith, on October 17, 2000, three weeks before the election. Six days later, the Chamber filed its declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court's decision (described more fully in the Chamber's petition for certiorari) was issued on Thursday, November 2, five days before the election. In that decision, the federal court held that the Chamber's advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

Given a definitive federal court ruling that the Chamber was not immune from those statutes, the Hon. Frank Vollor, who is the respondent here and who was Justice Smith's opponent, sought the next day an injunction in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in violation of Mississippi law.[1]

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[1] Judge Vollor is a Circuit Court judge in Mississippi's Ninth Judicial Circuit, which encompasses Warren, Sharkey, and Issaquena Counties. He has served in that position for over twelve years. The Circuit Court is Mississippi's trial level court of record in matters of law, as distinguished from the Chancery Court, which is the trial level court of record in matters of equity.

Faced with an uncontroverted allegation that the Chamber had purchased advertising in amounts far exceeding the corporate amounts permitted under Mississippi law, see petition for certiorari (pet. cert.) at 6 n.3 and Miss. Code Ann. § 97-13-15, and far exceeding those permitted in judicial elections under Mississippi law, *id.* 23-15-1021, and faced with the fact that Judge Vollor would be irreparably harmed if this massive illegal advertising were to continue in the two weekend days and one business day remaining before the election, the Chancery Court issued the temporary restraining order. Appendix to the petition for certiorari (pet. app.) 4a. The Chamber filed that same day in the Missisippi Supreme Court a petition for permissive interlocutory appeal under Rule 5, Miss. R. App. Proc., or alternatively for a writ of prohibition or mandamus under Rule 21, M.R.A.P., and simultaneously filed a motion for stay of the Chancery Court order. Appendix to this opposition (op. cert. app. 1a); pet. app. 49a. The Mississippi Supreme Court denied the motion for stay later that afternoon. *Id.* 1a. It is from that order that the Chamber has filed the present petition for certiorari. The Chamber's petition for interlocutory appeal remains pending in the Mississippi Supreme Court. The TRO was to expire by its own terms ten days after issuance, *id.* 4a, and Justice Scalia stayed it on Monday, November 6. *Id.* 5a.

Since that time, the Chamber has appealed the federal district court's decision to the United States Court of Appeals for the Fifth Circuit. *Chamber of Commerce v. Moore*, No. 00-60779 (5th Cir.). After obtaining one extension of time, the Chamber filed its brief in that court and the brief of the State appellees is being filed on April 23. In addition, the Chamber on December 4, 2000, took an appeal on the merits to the Supreme Court of Mississippi in a separate case involving what it calls in its petition for certiorari "TRO # 3." Pet. cert. 9. That injunction was issued by the Chancery Court of Jones County,

Mississippi on November 5, 2001. It is reproduced at pet. app. 60a. It involved an election for a separate seat on the Supreme Court, and like the TRO in the present case, it enjoined the Chamber from running its advertisements in violation of Mississippi law. The appeal is styled *Chamber of Commerce v. Landrum*, No. 2000-CA-2048 (Miss.). The record has been completed and the briefing schedule was issued on March 21, 2001, with the Chamber's brief due 40 days thereafter.

REASONS TO DENY THE WRIT

This case comes to this Court on a negligible record created in the exigencies of the unusual confluence of events that occurred here, with no review in the Supreme Court of Mississippi save for its denial of a stay. Indeed, the record does not even include the transcripts, audio, or video of the advertisements at issue. There is no final judgment in the trial court or on appeal, and the Chamber's petition for interlocutory appeal from the TRO remains pending in the Mississippi Supreme Court. To the extent there is any "final judgment" of the Mississippi Supreme Court giving this Court jurisdiction under 28 U.S.C. § 1257, it is only that Court's decision denying the stay. But the questions presented in the Chamber's petition for certiorari go not to the denial of the stay, but to the merits of the TRO.

In contrast to the present case, the underlying federal court decision which sparked these events, and upon the reasoning of which rests the state court TRO, is now pending in the Fifth Circuit upon a final judgment and a full record, including the advertisements in question. In addition, as just noted, the injunction similar to this one in the case of *Chamber of Commerce v. Landrum* (the so-called TRO #3) is pending

before the Mississippi Supreme Court on the merits.[2] It is far better for these questions to be first resolved in those courts by full review with written opinions, and if necessary, upon certiorari to this Court in those cases, than in the hurried circumstances of this case.[3]

In its petition here, the Chamber asserts that it "expects to engage in similar speech during future elections in Mississippi," pet. cert. 2, although it does not specify the elections in which it expects to run advertisements. Justice Jim Smith, the candidate in whose favor the Chamber ran the advertisements at issue here, was elected to a full term, and therefore will not be up for re-election for another eight years. Miss. Code Ann. 23-15-991. There are no scheduled state elections in Mississippi until the fall of 2002, when one of the additional seats on the Mississippi Supreme Court is up for election. Miss. Code Ann. §§ 9-3-1, 23-15-991, 23-15-993. That allows ample time for the Fifth Circuit in the federal case and the Mississippi Supreme Court in the *Landrum* case to resolve these issues with written opinions, and for the Chamber, if necessary, to seek review in this Court. Moreover, the Chamber can seek to expedite any of those proceedings if it believes time is of the essence.

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[2]On March 2, 2001, that Court denied the motion of the appellee in that case, Hon. Billy Joe Landrum, a losing candidate for one of the other Supreme Court seats, to dismiss the Chamber's appeal. Thus, the briefing is going forward and it appears the Court will decide, on the merits, the propriety of the injunction. Apparently, the Court is holding the petition for interlocutory appeal in the present case in abeyance until it resolves the merits in *Landrum*.

[3]There also are other cases that provide better vehicles than this one. For example, as noted in the brief of *amici curiae* Alliance for Democracy and Common Cause/Ohio, the existing situation in Ohio presents the express advocacy issue -- the second issue here -- more squarely than both the present case and the federal case now pending in the Fifth Circuit.

I. BECAUSE ANY FINAL JUDGMENT IN THE MISSISSIPPI SUPREME COURT GOES ONLY TO THE QUESTION OF A STAY AND NOT TO THE MERITS OF THE TEMPORARY RESTRAINING ORDER, AND BECAUSE THE CHAMBER'S PETITION SEEKS REVIEW ONLY OF THE MERITS, THERE IS NO "FINAL JUDGEMENT" ON THE MERITS GIVING THIS COURT JURISDICTION UNDER 28 U.S.C. § 1257 TO GRANT THE PETITION.

The Mississippi Supreme Court's action in the present case is not a "[f]inal judgment[] or decree[]" sufficient to confer jurisdiction on this Court under 28 U.S.C. § 1257, and it certainly is not a "final judgment" with respect to the merits of the TRO, which is what the Chamber is asking this Court to review. At present, the case is before this Court solely on the state supreme court's denial of a stay of a temporary and preliminary injunction. The merits of the injunction itself were not addressed by the Mississippi Supreme Court. There has been no further ruling from the Mississippi Supreme Court concerning the propriety of injunctive relief in this context, either on state or federal grounds. Justice Scalia has granted the stay that the Mississippi Supreme Court denied. Any request for further relief from this Court by way of certiorari is premature.

The Chamber's petition for interlocutory appeal, op. cert. app. 1a, remains pending in the Mississippi Supreme Court, where it apparently is being held in abeyance until that Court rules on the merits in *Landrum*. The Chamber's merits appeal in *Landrum* and its interlocutory appeal in the present case raise not simply the question of whether preliminary injunctive relief of this type should be stayed, but whether, on the merits, it is valid at all. Only after a ruling in *Landrum*, or in response to

the state court petition for interlocutory appeal in this case, will there be a final judgment of the Mississippi Supreme Court on the validity of an injunction in this unique election-eve context.

On selected occasions in the past, this Court has granted certiorari and reviewed the merits of state court injunctions, but has done so in situations where the propriety of the injunction already has been adjudicated on the merits by the state appellate courts. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 544-545 & n.2 (1976), *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417-418 & n. (1971), *Construction Laborers v. Curry*, 371 U.S. 542, 545-546 (1963). Even in those situations, the Court has said the matter of jurisdiction is difficult. For example, in *Keefe*, where the temporary injunction had been in effect for over three years and had been affirmed on the merits by the state appellate courts, this Court said the finality question was "not entirely free from doubt." 402 U.S. at 418 n.

But in cases where the state appellate courts have done nothing more than deny stays, this Court has limited itself to deciding whether a stay should issue to stop an ongoing injunction. In *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), this Court -- acting on an application for stay submitted to Justice Stevens and referred to the full Court -- did *not* review the *merits* of the ongoing injunction. It simply held that the state supreme court's *denial of a stay* was a "final judgment"under § 1257. The Court reversed the denial of the stay, which had the effect of staying the injunction. The case was remanded to the state supreme court, which later reversed the injunction on the merits. *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978). But this Court never said that there was a "final judgment" with respect to the merits of the injunction.

Similarly, in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., in chambers), Justice Blackmun held only that there was a final judgment regarding the state supreme court's failure to stay the ongoing injunction, never stating that there was a final judgment on the merits. 423 U.S. at 1329-1330. While granting the stay, he made clear the Court's preference that the matter "should be decided in the first instance by the Supreme Court of Nebraska." 423 U.S. at 1328. This Court later reviewed the merits of the injunction, but only after the state supreme court had done so (subsequent to Justice Blackmun's stay) and had affirmed the injunction (as modified) on the merits. *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 544.[4]

These few cases in which the Court has taken action on temporary state court injunctions stand for the proposition that, at most, the Court has jurisdiction to review the merits of the injunction under § 1257 only if there is a "final judgment" of the state appellate courts disposing of the merits. Where the only action taken by the state appellate courts is to deny a stay, any jurisdiction of this Court under § 1257 is limited to reviewing that denial and issuing a stay of an ongoing injunction if appropriate. That is what Justice Scalia did here when the TRO was in operation. Any post-stay adjudication of the merits must first occur, as both in *Skokie* and *Nebraska Press Ass'n*, in the state appellate courts.

Thus, to the extent there is a "final judgment" of the Mississippi Supreme Court here, it does not go to the merits of the TRO. The only question raised for this Court by that

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[4]Of course, in deciding whether to grant the stay, Justice Blackum examined the First Amendment questions. But he did so only to determine whether a stay should issue, and he did not purport to review the merits of the state supreme court's decision. The same is true for this Court's decision in *Skokie*.

judgment is whether the Mississippi Supreme Court should have issued a stay. But the questions presented by the Chamber's petition for certiorari go solely to the merits. Accordingly, this Court does not have jurisdiction under § 1257 to grant the Chamber's petition, and it must be denied.[5]

II. THIS CASE IS MOOT.

Given the stay and expiration of the TRO, the passing of the election, and the victory by Justice Smith, who was the candidate supported by the Chamber, this case is moot. The Chamber's claim that it "expects to engage in similar speech" in unspecified future elections, and that it will therefore encounter an injunction like the one here, is "wholly conjectural." *Golden v. Zwicker*, 394 U.S. 103, 109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). Justice Smith will not be running for re-election for another eight years, and Judge Vollor will not be seeking an injunction any time soon.[6] The Mississippi courts, aware of Justice Scalia's stay, will be

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[5]Of course, had the Chamber raised the propriety of the denial of the stay in its petition, it would make little sense for this Court to grant certiorari. Justice Scalia already has issued a stay, and there is no need for the members of this Court to hold a referendum on that action.

[6]Even if inclined to run again, Judge Vollor will not be eligible as a candidate for the Supreme Court until 2004 at the earliest. Mississippi's nine-member court is elected by staggered eight-year terms from three separate geographic districts in the state, with each district electing three justices. None of the three seats in Judge Vollor's district will be up for election prior to 2004. *See,* Miss. Code Ann. §§ 9-3-1, 23-15-991, 23-15-993.

unlikely to grant similar TROs in the future, and if they do, the Mississippi Supreme Court will entertain any motions for stay with an awareness of Justice Scalia's action here.[7] As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), and certainly not at the hands of the respondent here. *Compare, Norman v. Reed*, 502 U.S. 279, 288 (1992) ("There would be every reason to expect *the same parties* to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990.") (emphasis added).

And even if the unusual scenario here is capable of repetition, it will not evade review. The similar injunction involving the Chamber is pending on the merits before the Mississippi Supreme Court in the *Landrum* case, and the underlying First Amendment question of whether these advertisements constitute express advocacy or issue advocacy is pending before the Fifth Circuit. The Chamber's petition for interlocutory appeal in the present case, op. cert. app. 1a, remains pending in the Mississippi Supreme Court, apparently

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[7]The Chamber refers to another TRO issued later in the morning of November 6 after Justice Scalia issued his stay earlier that morning in this case. Pet. cert. 10-11. While unfortunate, there is nothing to suggest this will be repeated in the future, or that the Mississippi Supreme Court would not have stayed that TRO itself (in light of Justice Scalia's stay) had it been asked. (In the interest of time, the Chamber simply supplemented its stay application to Justice Scalia rather than asking the Mississippi Supreme Court to stay the later TRO). At least one other Mississippi chancery judge, when asked to enjoin the Chamber advertisements after Justice Scalia's stay, refused to do so. *Diaz v. Chamber of Commerce*, No. C2402-00-0106 (Chancery Ct., Harrison Cty., Miss., Nov. 6, 2000) (denying motion for preliminary injunction). Thus, despite the Chamber's contrary suggestion, there is not much of a chance that history will be repeated here.

being held in abeyance until *Landrum* is decided. Thus, the questions presented by the Chamber likely will be decided in the lower courts in a timely manner without the need for further intervention by this Court at this time.

III. EVEN IF THIS COURT HAS JURISDICTION TO GRANT THE PETITION IN THIS CASE AND REVIEW THE MERITS OF THE TEMPORARY RESTRAINING ORDER, IT SHOULD DECLINE TO DO SO.

Even if this Court has jurisdiction, it should decline the Chamber's invitation to take this case and instead should reserve these issues for a different case on a better record. The Chamber claims that the world cannot wait, that these injunctions are part of "a growing and disturbing practice," *id.* 12, and that absent swift action from this Court, future election advertising will be subject to a "proliferation of . . . prior restraints." Pet. cert. 11. But despite these alarms, there is no brush fire of injunctions sweeping the nation. Indeed, in its canvass of the law, the Chamber has uncovered only two injunctions outside of the recent Mississippi election, one from 1994 and one from 1996. *Id.* 11, 14. Of course, the TROs from the Mississippi election were triggered by the federal district court's expedited ruling in the Chamber's own declaratory judgment action, all coming shortly before the election of four seats to the Mississippi Supreme Court. This unusual timing and chain of events is unlikely to repeat itself.

With respect to the underlying issue raised in that federal case, the Chamber contends that action from this Court is required because any future ruling in its favor by the Fifth Circuit will not bind the Mississippi courts. Pet. cert. 20-21 n.13. But the entire state court process in this case was occasioned by the federal district court's ruling that the

Chamber's advertisements were not immune from Mississippi campaign finance laws on First Amendment grounds. The Chancery Court specifically relied on the federal ruling in issuing the TRO in this case. Pet. app. 4a. Having relied upon the federal district court's ruling, it is hard to believe that the Mississippi courts will later turn a blind eye should the Fifth Circuit reverse the district court and hold that these advertisements are immune from state regulation. *See, Burrell v. Mississippi State Tax Comm'n*, 536 So.2d 848, 864 (Miss. 1988) ("When Mississippi courts are enforcing rights created under federal law, the Mississippi courts must follow the interpretations of those rights provided by federal courts.") [8]

At any rate, it is clear that the record of the present case, which does not include the Chamber's advertisements, is not the record upon which the important First Amendment question of express advocacy should be resolved. Neither is it the case in which the prior restraint issue should be resolved. Indeed, if the Court chooses (as we suggest) not to resolve the express advocacy question here, it could only resolve the separate

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[8] Of course, it is the Chamber that chose to pursue its declaratory judgment action in federal court rather than state court. It could have filed such an action in state court and indeed still can. However, there is no need now, particularly given that all of these issues are raised in the Chamber's appeal to the Mississippi Supreme Court in *Landrum*.

The Chamber makes the unfortunate suggestion that Mississippi judges may have been biased in favor of fellow judges who requested the TROs and against the Chamber, which "was from out-of-state and perhaps represented disfavored views." Pet. cert. 13. Of course, the fellow judges who requested the TROs were in election contests against other fellow judges and there is nothing to indicate that the Chancery Judge in this case, for example, was biased in favor of Judge Vollor and against Justice Smith. Furthermore, there is absolutely no basis for the Chamber's suggestion that the Mississippi courts are prejudiced against out-of-state litigants or against the Chamber because of its purported "disfavored views."

question of the validity of the TRO by assuming that the advertisements are express advocacy and are subject to state regulation. While the Chamber indicates that this question is easily answered by speaking in the ominous terms of "prior restraint," the matter is not so simple.

If it is assumed that the federal district court is correct, and if the spending limits in Mississippi law were far exceeded by the Chamber to the detriment of Judge Vollor (a proposition the Chamber has not disputed in this Court), an injunction against further illegal advertisements was the only means by which the election process could be protected. Without an injunction, the candidate whose supporters abide by the law is at a distinct disadvantage to the candidate whose supporters flaunt the law with only the risk of an after-the-fact civil or criminal fine.

Unlike cases where, for example, a determination of prejudice stemming from the pretrial reporting of a defendants' confessions "was of necessity speculative," *Nebraska Press Assocation v. Stuart*, 427 U.S. 539, 563 (1976), or even where a claim of harm from publication of national security documents was subject to question, *New York Times Co. v. United States,* 403 U.S. 713, 726-727 (1971) (Brennan, J., concurring), the illegality here and the ensuing harm are clear. Again, *if* the federal court is correct, a determination of whether the monetary limits have been violated is simply a matter of numbers -- particularly where, as here, the amounts far exceed the law's limits. [9]

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[9]Unlike the types of speculation involved in many prior restraint cases, "relative certainty can ordinarily be obtained in the context of prepublication restraints on the publication of obscene material or commercial advertisements. . . . A court's determination that material is obscene or an advertisement false is thus as plausible before as after the communication's publication." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-36 (2nd Ed. 1988). The same can be said for transgressions, particularly substantial ones, of the monetary limits in campaign finance laws.

Certainly it seems that a state, if it chose, could pass campaign finance laws limiting, say, corporate expenditures for express campaign advocacy, *see, Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 664-665 (1990), and provide that if the monetary limits contained in those laws are exceeded in mid-campaign, and if the violation is proved by clear and convincing evidence, further advertising in violation of the limits could be enjoined. The State could do this, it would seem, to insure that the process is not corrupted by those willing to ignore the law and spend massive amounts of corporate money. And if the First Amendment does not prohibit a state from taking such action, then it cannot be said -- as the Chamber suggests here -- that injunctions against express advocacy are per se unconstitutional. This is a complicated question, as is the question of the circumstances under which a state can rightfully enjoin massive violations of its campaign finance statutes. These matters should not be resolved in the present case, which involves an unlikely factual scenario. And if they are to be resolved in this scenario, they should be addressed first in a case like *Landrum,* where the Mississippi Supreme Court will have an opportunity to fully consider the merits of an injunction like this one and the Chamber's contentions regarding it.[10]

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[10]Indeed, in the present case, in both the trial court and in the pending petition for interlocutory appeal to the Mississippi Supreme Court, op. cert. app. 7a-8a, 11a-13a, the Chamber has contended that the injunctions violate not only the First Amendment, but also are contrary to Mississippi law in a number of respects. Presumably, the Chamber will argue the same thing before the Mississippi Supreme Court in *Landrum.* If the Mississippi Supreme Court agrees with any of the Chamber's state law contentions after full review on the merits, there will be no need to resolve the federal constitutional question.

CONCLUSION

There is no "final judgment or decree" under § 1257 going to the merits of the TRO being challenged by the Chamber, and this case is moot. But even if this Court does have jurisdiction to grant the Chamber's petition, the Court should decline to exercise it for all of the reasons listed in this brief. This case stems from an unusual set of events unlikely to be repeated. The Chamber's federal lawsuit and the eleventh hour federal ruling resulted in hurried state court proceedings that led to a negligible record, no evidentiary hearing, no final judgment, and no opportunity for considered reflection or a written opinion from the state's highest court. This case has not been decided on the merits. The questions it raises should first be resolved elsewhere.

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2000-M-1839

IN RE: CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PETITIONER

PETITION FOR INTERLOCUTORY APPEAL BY PERMISSION OR, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS OR PROHIBITION

(Filed Nov. 3, 2000)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. _____

IN RE: CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PETITIONER

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the Justices of this Court to evaluate possible disqualifications or recusal.

1. United States Chamber of Commerce, defendant-appellant.

2. Michael B. Wallace, Christopher R. Green and Phelps Dunbar, L.L.P., attorneys for appellant United States Chamber of Commerce.

3. Circuit Judge Frank G. Vollor, plaintiff-appellee.

4. Paul Kelly Loyacono, Vicksburg, Mississippi, attorney plaintiff-appellee Frank G. Vollor.

5. Because this matter concerns advertisements concerning candidates for election to this Court, it is possible that certain Justices may consider themselves interested even though not a party to this action.

/s/ Michael B. Wallace
MICHAEL B. WALLACE

INTRODUCTION

The Chancery Court of the First Judicial District of Hinds County has ordered the Chamber of Commerce of the United States of America ("U.S. Chamber") and eight local television stations to cease running certain advertisements concerning plaintiff Frank G. Vollor and Justice Jim Smith, both of whom are candidates for election to this Court in the general election scheduled for Tuesday, November 7. This order followed by a day a federal opinion holding that the First Amendment does not shield the U.S. Chamber from reporting requirements under Mississippi state law regarding four of those advertisements. *See Chamber of Commerce v. Moore*, No. 3:00-CV-778WS (S.D.Miss. Nov. 2, 2000). During that federal litigation, the Attorney General repeatedly and explicitly disclaimed any intention of seeking to enjoin the advertisements.

The U.S. Chamber respectfully requests this Court to grant an interlocutory appeal, or, in the alternative, to issue its writ of mandamus or prohibition, so as to vacate the Circuit Court's order. Such an order will "[m]aterially advance the termination of the litigation and avoid exceptional expense to the parties" and will also "protect a party from substantial and irreparable injury." M.R.A.P. 5(a)(1) and (2).

FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES

This fall, the U.S. Chamber has independently sponsored a series of television advertisements concerning candidates for judicial office in several states. As a part of

that effort, on October 17, 2000, the U.S. Chamber began airing television advertisements in Mississippi to inform the public about the experience of certain candidates for the Mississippi Supreme Court regarding particular issues of public importance, such as the administration of criminal law.

The Attorney general and Secretary of State believed that these expenditures subjected the U.S. Chamber to the reporting requirements of Miss. Code Ann. § 23-15-801 *et seq*. The U.S. Chamber disagreed and filed suit in federal court seeking a declaration that four of the advertisements were not "express advocacy" under *Buckley v. Valeo*, 424 U.S. 1 (1976), and therefore were not subject to state regulation. Following an expedited hearing, Judge Wingate of the Southern District of Mississippi disagreed. He held that the four advertisements at issue were express advocacy, and so were outside *Buckley's* protections from state regulation. *See Chamber of Commerce v. Moore, supra*, memorandum opinion at 27.

On November 3, Judge Frank G. Vollor obtained the present temporary restraining order forbidding the broadcast of the U.S. Chamber's advertisements concerning him or his opponent, Justice Jim Smith. His application to the Chancellor is attached as Exhibit A. The Chancellor's temporary restraining order is attached as Exhibit B. The U.S. Chamber's petition for permission for interlocutory appeal and stay pending appeal is attached as Exhibit C. Judge Singletary has left for the weekend without ruling on that petition.

STATEMENT OF ISSUES AND RELIEF REQUESTED

Petitioner seeks certification on interlocutory appeal, pursuant to M.R.A.P. 5, regarding the following issues: Whether Judge Vollor has proven a violation of Mississippi's campaign laws, and, if so, whether such proof can support, consistent with the First Amendment of the federal Constitution, an injunction against political speech. Alternatively, the U.S. Chamber seeks a writ of prohibition or mandamus pursuant to M.R.A.P. 21 instructing the Chancery Court to vacate its TRO.

REASONS FOR GRANTING RELIEF

1. The TRO is an improper prior restraint on First Amendment rights.

In the leading case, the United States Supreme Court refused to condone an injunction against *The New York Times'* publication of the so-called "Pentagon Papers," even though the documents had apparently been obtained illegally and their publication threatened national security. The Court held: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citations and quotation marks omitted). Similarly, in *Near v. Minnesota*, 283 U.S. 697, 702, 722-23 (1931), the Supreme Court struck down a statute that permitted injunctive relief against "malicious" or "defamatory" newspaper articles, and in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 541, 570 (1976), the Supreme Court held that

a restraint against news media reports on a criminal defendant's confessions or admissions failed to meet the heavy burden of presumption against prior restraints.

More recently, the Fifth Circuit refused to allow restrictions on speech between litigants and potential members of a class, reasoning: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss – a loss in the immediacy, the impact, of speech." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 469 (5th Cir. 1980) (en banc) (citations and quotations omitted). The court explained "[t]he justification for drawing a distinction based on th[e] difference [between prior restraint and post publication enforcement] is that a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Id.* at 468. The effect of enjoining speech, instead of seeking to punish the alleged improper activity through proceedings which safeguard an accused's rights and defenses, is clear:

> "[A] prior restraint may be distinguished from a statute prohibiting publication in that the former has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* at 469 (quotation omitted).

See also Jeffries v. Mississippi, 724 So.2d 897 (Miss. 1998) (rejecting prior restraint prohibiting a reporter from publishing information discussed in open court).

A case that is precisely on point is *Republican Party of Florida v. Florida Elections Commission*, 658 So.2d 653 (Fla.

App. 1995). In that case, just weeks prior to an election, the plaintiffs alleged that certain advertisements by the Republican Party of Florida ("RPF") constituted illegal campaign contributions under Florida law, and obtained an injunction from the trial court against the airing of those advertisements. *Id.* at 654-55. In no uncertain terms the Court of Appeal reversed the injunction, holding that the injunction was an improper prior restraint of the RPF's First Amendment rights, even if the advertisements constituted illegal contributions. *Id.* at 655, 657. The Court found that the State's interest in enforcing its election laws is adequately protected through the agency's procedures and not the extraordinary remedy of prior restraint of free speech rights. *Id.* at 657. "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Id.* (quotation omitted).

The Florida Court of Appeal reiterated the longstanding view that prior restraint is impermissible, especially if the statutory or regulatory scheme provides a different remedy. In *Near*, the United States Supreme Court traced this precept back to Blackstone's Commentaries, noting that every person has a right, as here, to "lay what sentiments he pleases before the public," and then take the consequences afterwards if he violates the law. 283 U.S. at 714 (quoting 4 Bl. Com. 151, 152).

2. The TRO is not authorized by Mississippi law.

The Mississippi Election Code provides ample remedies for violation of the statute. *See* Miss. Code Ann.

§ 23-15-813 (civil penalties); *id.* § 23-15-811 (other sanctions). Implicitly recognizing the prior restraint doctrine, the statute does not grant authority to seek an injunction against violations.

Of the utmost importance is the fact that § 23-15-13 vests initial enforcement authority in the Secretary of State. Neither the Secretary of State nor the Attorney General, who has principal responsibility for enforcement of the State's laws, was joined as a party in the Chancery Court proceedings; although both Secretary Clark and General Moore are parties to the federal proceeding, they have not sought any relief against the Chamber. The detailed remedial scheme provided by the statute makes no allowance for an enforcement action brought by candidate or other private citizen.

Nor is enforcement authorized under general principles of Mississippi equity. "Courts of equity concern themselves only with matters of property and with the maintenance of civil rights, and do not interfere with issues that are purely personal, or political, or with crimes. . . . " V. Griffith, *Mississippi Chancery Practice* § 435 (2d ed. 1950). In light of the political nature of this action, and the criminal penalties provided by § 23-15-811, the Chancery Court had no power under Mississippi law to enjoin the broadcast of these advertisements.

CONCLUSION

This Court should summarily vacate the Chancellor's order, pursuant to M.R.A.P. 21. Alternatively interlocutory appeal should be granted and the matter set for briefing and argument, pursuant to M.R.A.P. 5.

Respectfully submitted,

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA

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IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

FRANK G. VOLLOR — PLAINTIFF

VS. — NO. G2000-2128 S/2

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS — DEFENDANTS

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TRANSCRIPT OF PROCEEDINGS HELD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE **THE HONORABLE WILLIAM H. SINGLETARY**, CHANCELLOR, ON THE 3RD DAY OF NOVEMBER, 2000.

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APPEARANCES:

Present and Representing the Plaintiff:

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Vicksburg, Mississippi

Present and Representing the Defendants:

MICHAEL B. WALLACE, ESQ.
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* * *

[16] [MR. WALLACE] Nevertheless, Your Honor, they have come to this Court asking to enjoin the broadcast of these advertisements. In addition to their failure to establish personal jurisdiction over the Chamber, they have failed to allege or establish the jurisdiction of this Court. There is not a single allegation anywhere in this application that suggests why the chancery court has jurisdiction over this matter. Indeed, it is not even clear – as a matter of fact, it is clear to the contrary that no action is pending before this Court. As the Court knows, Rule 3 says that an action commences with the filing of a complaint, and Rule 65, 65(b), on TRO presupposes a complaint, because it says you may proceed on your verified complaint. No complaint has been served on me. We have simply an application for a TRO in an action which has not been commenced in a court, the jurisdiction of which has not been established. They suggest that this court is entitled to enjoin these advertisements, presumably on the theory that they are illegal.

[17] Your Honor, under any theory of illegality, the statute itself sets up an enforcement scheme. The enforcement scheme for the reporting statutes and independent expenditure is a criminal enforcement scheme. Under Section 23-15-811(a), "Any candidate or any other person who shall willfully and deliberately . . . violate the provisions and prohibitions of this article shall be guilty of a misdemeanor. . . . " Now, again, they've not explained how we have violated the article. But if we have, we have committed a crime. Now, I've not been able to get in the library, but I did pick up my Griffith's on the way over here. And Section 435 of the second edition of Griffith

states, "The courts of equity concern themselves only with matters of property and with the maintenance of civil rights and do not interfere with issues that are purely personal or political or with crimes." Now, this case falls in at least two of those categories, Your Honor. It is political and, according to the allegations of the application, it is criminal. This Court has no jurisdiction whatsoever to enjoin the commission of a crime and no TRO may enter here on these allegations.

Indeed, this statutory scheme puts full enforcement power in the hands of the attorney general and the secretary of state. There is no provision whatsoever for enforcement of the statute [18] by private attorney general. The most that may be possibly available in the way of private enforcement is further down in Section 23-15-811. It says, in addition to the criminal penalties, anyone who fails to file a report "may be compelled to file such statement or report by an action in the nature of a mandamus." If we have failed to follow the reporting statutes, which we deny, Your Honor, the remedy is for a mandamus to be brought against us. Because this is a public statute, the attorney general would have to file that mandamus. I imagine the Court is familiar with the cases that suggest when you call on the attorney general to bring a mandamus and he does not do so, in some circumstances the private party may bring a mandamus. None of that is done here. To the extent that there can be any remedy under the statutory scheme for private parties, that remedy can only be a mandamus after the attorney general has failed to file it, and the mandamus goes only to the report. It does not take the ads off the air.

There is one other item. In addition to the fact this Court has no jurisdiction, no authority to issue an injunction, this matter remains within the – fully within the jurisdiction of another court. Judge Wingate has issued an opinion. He has not issued a judgment as of half an hour ago when I called over there. The matter [19] is still before Judge Wingate. The State of Mississippi is represented in that action by its attorney general and its secretary of state, the officers who are given authority to enforce this statute. To the extent Judge Vollor claims to have authority to enforce the statute as a private attorney general, he is clearly in privity with the public attorney general, who is presently litigating this matter. And this matter, then, should be dismissed or abated as long as jurisdiction over this whole dispute is in another court. And if Judge Vollor believes that the attorney general is not properly representing him and he wants to appear as a private attorney general, the case is still pending, and he's welcome to go over there and file his motion to intervene and his application for relief over there. That's where he ought to be.

* * *